

117TH CONGRESS  
1ST SESSION

# S. 2710

To promote competition and reduce gatekeeper power in the app economy,  
increase choice, improve quality, and reduce costs for consumers.

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## IN THE SENATE OF THE UNITED STATES

AUGUST 11 (legislative day, AUGUST 10), 2021

Mr. BLUMENTHAL (for himself, Mrs. BLACKBURN, and Ms. KLOBUCHAR) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To promote competition and reduce gatekeeper power in the app economy, increase choice, improve quality, and reduce costs for consumers.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Open App Markets  
5       Act”.

6       **SEC. 2. DEFINITIONS.**

7       In this Act:

8           (1) APP.—The term “App” means a software  
9       application or electronic service that may be run or

1       directed by a user on a computer, a mobile device,  
2       or any other general purpose computing device.

3                     (2) APP STORE.—The term “App Store” means  
4       a publicly available website, software application, or  
5       other electronic service that distributes Apps from  
6       third-party developers to users of a computer, a mo-  
7       bile device, or any other general purpose computing  
8       device.

9                     (3) COVERED COMPANY.—The term “Covered  
10      Company” means any person that owns or controls  
11      an App Store for which users in the United States  
12      exceed 50,000,000.

13                     (4) DEVELOPER.—The term “developer” means  
14       a person that owns or controls an App or an App  
15       Store.

16                     (5) IN-APP PAYMENT SYSTEM.—The term “In-  
17       App Payment System” means an application, serv-  
18       ice, or user interface to process the payments from  
19       users of an App.

20                     (6) NON-PUBLIC BUSINESS INFORMATION.—  
21       The term “non-public business information” means  
22       non-public data that is—

23                         (A) derived from a developer or an App or  
24       App Store owned or controlled by a developer,

1           including interactions between users and the  
2           App or App Store of the developer; and  
3           (B) collected by a Covered Company in the  
4           course of operating an App Store or providing  
5           an operating system.

6 **SEC. 3. PROTECTING A COMPETITIVE APP MARKET.**

7       (a) EXCLUSIVITY AND TYING.—A Covered Company  
8 shall not—

9           (1) require developers to use an In-App Pay-  
10          ment System owned or controlled by the Covered  
11          Company or any of its business partners as a condi-  
12          tion of being distributed on an App Store or acces-  
13          sible on an operating system;

14           (2) require as a term of distribution on an App  
15          Store that pricing terms or conditions of sale be  
16          equal to or more favorable on its App Store than the  
17          terms or conditions under another App Store; or

18           (3) take punitive action or otherwise impose  
19          less favorable terms and conditions against a devel-  
20          oper for using or offering different pricing terms or  
21          conditions of sale through another In-App Payment  
22          System or on another App Store.

23       (b) INTERFERENCE WITH LEGITIMATE BUSINESS  
24 COMMUNICATIONS.—A Covered Company shall not impose  
25 restrictions on communications of developers with the

1 users of the App through an App or direct outreach to  
2 a user concerning legitimate business offers, such as pric-  
3 ing terms and product or service offerings.

4 (c) NON-PUBLIC BUSINESS INFORMATION.—A Cov-  
5 ered Company shall not use non-public business informa-  
6 tion derived from a third-party App for the purpose of  
7 competing with that App.

8 (d) INTEROPERABILITY.—A Covered Company that  
9 controls the operating system or operating system configu-  
10 ration on which its App Store operates shall allow and pro-  
11 vide the readily accessible means for users of that oper-  
12 ating system to—

13 (1) choose third-party Apps or App Stores as  
14 defaults for categories appropriate to the App or  
15 App Store;

16 (2) install third-party Apps or App Stores  
17 through means other than its App Store; and

18 (3) hide or delete Apps or App Stores provided  
19 or preinstalled by the App Store owner or any of its  
20 business partners.

21 (e) SELF-PREFERENCING IN SEARCH.—

22 (1) IN GENERAL.—A Covered Company shall  
23 not provide unequal treatment of Apps in an App  
24 Store through unreasonably preferencing or ranking

1       the Apps of the Covered Company or any of its busi-  
2       ness partners over those of other Apps.

3                   (2)           CONSIDERATIONS.—Unreasonably  
4       preferencing—

5                   (A) includes applying ranking schemes or  
6       algorithms that prioritize Apps based on a cri-  
7       terion of ownership interest by the Covered  
8       Company or its business partners; and

9                   (B) does not include clearly disclosed ad-  
10      vertising.

11               (f) OPEN APP DEVELOPMENT.—Access to operating  
12      system interfaces, development information, and hardware  
13      and software features shall be provided to developers on  
14      a timely basis and on terms that are equivalent or func-  
15      tionally-equivalent to the terms for access by similar Apps  
16      or functions provided by the Covered Company or to its  
17      business partners.

18   **SEC. 4. PROTECTING THE SECURITY AND PRIVACY OF**  
19               **USERS.**

20               (a) IN GENERAL.—Subject to section (b), a Covered  
21      Company shall not be in violation of a subsection of sec-  
22      tion 3 for an action that is—

23                   (1) necessary to achieve user privacy, security,  
24      or digital safety;

25                   (2) taken to prevent spam or fraud; or

1                             (3) taken to prevent a violation of, or comply  
2                             with, Federal or State law.

3                             (b) REQUIREMENTS.—Section (a) shall only apply if  
4     the Covered Company establishes by clear and convincing  
5     evidence that the action described is—

6                             (1) applied on a demonstrably consistent basis  
7                             to Apps of the Covered Company or its business  
8                             partners and to other Apps;

9                             (2) not used as a pretext to exclude, or impose  
10                             unnecessary or discriminatory terms on, third-party  
11                             Apps, In-App Payment Systems, or App Stores; and

12                             (3) narrowly tailored and could not be achieved  
13                             through a less discriminatory and technically pos-  
14                             sible means.

15 **SEC. 5. ENFORCEMENT.**

16                             (a) ENFORCEMENT.—

17                             (1) IN GENERAL.—The Federal Trade Commis-  
18                             sion, the Attorney General, and any attorney general  
19                             of a State subject to the requirements in paragraph  
20                             (4) shall enforce this Act in the same manner, by  
21                             the same means, and with the same jurisdiction,  
22                             powers, and duties as though all applicable terms  
23                             and provisions of the Federal Trade Commission Act  
24                             (15 U.S.C. 41 et seq.) or the Clayton Act (15 U.S.C.

1       12 et seq.), as appropriate, were incorporated into  
2 and made a part of this Act.

3             (2) UNFAIR METHODS OF COMPETITION.—A  
4 violation of this Act shall also constitute an unfair  
5 method of competition under section 5 of the Fed-  
6 eral Trade Commission Act (15 U.S.C. 5).

7             (3) FEDERAL TRADE COMMISSION INDE-  
8 PENDENT LITIGATION AUTHORITY.—If the Federal  
9 Trade Commission has reason to believe that a Cov-  
10 ered Company violated this Act, the Federal Trade  
11 Commission may commence a civil action, in its own  
12 name by any of its attorneys designated by it for  
13 such purpose, to recover a civil penalty and seek  
14 other appropriate relief in a district court of the  
15 United States against the covered platform operator.

16             (4) PARENTS PATRIAE.—Any attorney general of  
17 a State may bring a civil action in the name of such  
18 State for a violation of this Act as parens patriae on  
19 behalf of natural persons residing in such State, in  
20 any district court of the United States having juris-  
21 diction of the defendant, and may secure any form  
22 of relief provided for in this section.

23             (b) SUITS BY DEVELOPERS INJURED.—

24                 (1) IN GENERAL.—Any developer who shall be  
25 injured by reason of anything forbidden in this Act

1 may sue therefor in any district court of the United  
2 States in the district in which the defendant resides  
3 or is found or has an agent, without respect to the  
4 amount in controversy, and shall recover threefold  
5 the damages by him sustained, and the cost of suit,  
6 including a reasonable attorney's fee. The court may  
7 award under this subsection, pursuant to a motion  
8 by such developer promptly made, simple interest on  
9 actual damages for the period beginning on the date  
10 of service of such developer's pleading setting forth  
11 a claim under this Act and ending on the date of  
12 judgment, or for any shorter period therein, if the  
13 court finds that the award of such interest for such  
14 period is just in the circumstances. In determining  
15 whether an award of interest under this subsection  
16 for any period is just in the circumstances, the court  
17 shall consider only—

18 (A) whether such developer or the opposing  
19 party, or either party's representative, made  
20 motions or asserted claims or defenses so lack-  
21 ing in merit as to show that such party or rep-  
22 resentative acted intentionally for delay, or oth-  
23 erwise acted in bad faith;

24 (B) whether, in the course of the action in-  
25 volved, such developer or the opposing party, or

1           either party's representative, violated any appli-  
2           cable rule, statute, or court order providing for  
3           sanctions for dilatory behavior or otherwise pro-  
4           viding for expeditious proceedings; and

5           (C) whether such developer or the opposing  
6           party, or either party's representative, engaged  
7           in conduct primarily for the purpose of delaying  
8           the litigation or increasing the cost thereof.

9           (2) INJUNCTIVE RELIEF.—Any developer shall  
10          be entitled to sue for and have injunctive relief, in  
11          any court of the United States having jurisdiction  
12          over the parties, against threatened loss or damage  
13          by a violation of this Act, when and under the same  
14          conditions and principles as injunctive relief against  
15          threatened conduct that will cause loss or damage is  
16          granted by courts of equity, under the rules gov-  
17          erning such proceedings, and upon the execution of  
18          proper bond against damages for an injunction im-  
19          providently granted and a showing that the danger  
20          of irreparable loss or damage is immediate, a pre-  
21          liminary injunction may issue. In any action under  
22          this paragraph in which the plaintiff substantially  
23          prevails, the court shall award the cost of suit, in-  
24          cluding a reasonable attorney's fee, to such plaintiff.

**1 SEC. 6. RULE OF CONSTRUCTION.**

2 Nothing in this Act shall be construed to limit any  
3 authority of the Attorney General or the Federal Trade  
4 Commission under the antitrust laws (as defined in the  
5 first section of the Clayton Act (15 U.S.C. 12)), the Fed-  
6 eral Trade Commission Act (15 U.S.C. 41 et seq.), or any  
7 other provision of law or to limit the application of any  
8 law.

**9 SEC. 7. SEVERABILITY.**

10 If any provision of this Act, or the application of such  
11 a provision to any person or circumstance, is held to be  
12 unconstitutional, the remaining provisions of this Act, and  
13 the application of the provision held to be unconstitutional  
14 to any other person or circumstance, shall not be affected  
15 thereby.

